ROSITA TRUJILLO

IBLA 83-201 Decided October 31, 1983

Appeal from decision of the Idaho State Office, Bureau of Land Management, denying appellant's protest of conflicting noncompetitive oil and gas lease offers. I-16942, etc.

Reversed in part; set aside and hearing ordered.

1. Oil and Gas Leases: Bona Fide Purchaser

The bona fide purchaser of an oil and gas "lease" without notice of a defect in the assignor's title is protected by statute from cancellation of his interest in the lease. The purchaser of an interest in a "lease offer" cannot foreclose the Department from properly adjudicating the lease offer. Hence, the assignee is properly deemed to have notice of any potential defects disclosed in the case record during adjudication prior to lease issuance to the extent that an administrative decision on adjudication is not final but subject to appeal by a party adversely affected.

2. Oil and Gas Lease Applications: Sole Party in Interest

Where a partner in a firm engaged in the oil and gas business files an oil and gas lease offer in his own name, the partnership is entitled, in the absence of an agreement to the contrary, to participate in the benefits accruing from any issued lease and has an "interest" therein within the meaning of 43 CFR 3100.0-5(b) as a consequence of the partner's fiduciary duty to the firm. Such an interest is properly found where the partnership agreement contains a covenant not to compete.

3. Rules of Practice: Appeals: Hearings

An evidentiary hearing is properly ordered pursuant to 43 CFR 4.415 where the record is inconclusive on an issue of material fact dispositive of the rights of the parties to an appeal.

APPEARANCES: C. M. Peterson, Esq., Denver, Colorado, for appellant; R. Dennis Ickes, Esq., Salt Lake City, Utah, for Emery Energy, Inc.; William R. Murray, Esq., Office of the Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been brought by Rosita Trujillo from a November 5, 1982, decision of the Idaho State Office, Bureau of Land Management (BLM), which denied her protest of certain noncompetitive oil and gas lease offers filed by Emery Energy, Inc. (Emery). The BLM decision denied appellant's protest that Emery had failed to file proper evidence of its corporate qualifications to hold oil and gas leases and that Emery failed to disclose the existence of other parties holding an interest in the lease offers. The BLM decision upheld appellant's protest to the extent that it found that one of the protested lease offers (I-17604) was filed at a time when Emery exceeded the statutory acreage limit and, therefore, must be rejected. Trujillo has appealed that part of the BLM decision denying her protest of the lease offers filed by Emery in October and November of 1980. 1/ Subsequent to the denial of appellant's protest of the Emery lease offers, the protested leases were issued to Emery with an effective date of December 1, 1982, and appellant's lease offers were rejected to the extent they conflict with the lands in the Emery leases.

In her statement of reasons for appeal, appellant asserts that the Emery lease offers were filed on October 16, 1980, and November 6, 1980, and that conflicting offers to lease the same lands were filed by appellant on February 22, 1982. Appellant contends that she, rather than Emery, is the first-qualified applicant for a lease of the subject lands and, thus, is entitled to issuance of her leases. Appellant alleges that Emery is disqualified because it failed to disclose the existence of other parties holding an interest in the lease offers, failed to maintain current evidence of corporate qualifications, and had interests in leases and lease offers in excess of the acreage limitation at the time the protested lease offers were filed.

With respect to the question of whether Emery was the sole party in interest in the lease offers, appellant points to the terms of a limited partnership agreement recorded November 26, 1979, between Emery, Tideway

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1/ The lease offers filed by Emery and the conflicting offers filed by appellant together with the respective dates of filing are:

Emery		Trujillo	
Lease Offer	Date Filed	Lease Offer	Date Filed
I-16942	10/16/80	I-18568	2/22/82
I-16943	10/16/80	I-18567	2/22/82
I-16944	10/16/80	I-18569	2/22/82
I-16946	10/16/80	I-18570	2/22/82
I-16982	11/6/80	I-18565	2/22/82
I-16983	11/6/80	I-18566	2/22/82

The decision affirming the protest as to lease offer I-17604 is not at issue in this appeal.

Western, Inc., and Robert Howard. Appellant alleges that Article 27 of the partnership agreement entitled "Non-Competition" precluded the general partners from competing with each other in filing noncompetitive over-the-counter oil and gas lease offers within the State of Idaho and, further, required Emery, as a general partner, to extend to the other general partner the opportunity to participate in any lease for which it filed an offer to the extent of a 50 percent interest. Counsel for appellant contends that this is an interest in the lease as defined by 43 CFR 3100.0-5(b) which was required to be disclosed on the lease offer. 2/ Trujillo argues that the partnership was in effect and had not been terminated at the time that Emery filed the protested lease offers.

Counsel for Emery has responded to appellant's statement of reasons. Emery contends that the limited partnership agreement did not create an interest in any third parties in the Emery lease offers which were filed for its own account. Counsel contends that the agreement does not contemplate that every lease offer filed by Emery would become partnership property. Further, Emery asserts that the partnership terminated prior to the time that Emery filed the lease offers at issue in this case. The partnership was abandoned on September 24, 1980, Emery alleges, when the parties verbally agreed to cease the business of the partnership. In addition, Emery argues that appellant has not tendered evidence that it was over the acreage limit at the time that the lease offers under appeal were filed. Finally, Emery contends that two of the leases have been sold to Exxon who is a bona fide purchaser and that these leases are consequently immune from cancellation.

The Office of the Solicitor has entered an appearance on behalf of BLM in this case noting that one of the leases at issue, I-16943, was in part issued in error for lands which the Department was barred by statute from leasing. Hence, the Solicitor argues that the lease must be canceled in part as to the lands precluded from leasing.

The issues raised by this complex protest and the briefs of the parties appearing on appeal may be summarized as follows:

1. Whether a lease is properly canceled administratively by the Secretary to the extent it is issued without legal authority through inadvertence of his subordinates.

2. Whether Emery maintained a complete list of corporate officers with its statement of qualifications as required by 43 CFR 3102.2-5 (1981).

2/ Appellant also alleges that R. Dennis Ickes held an undisclosed interest in the lease offers. A copy of the July 30, 1978, agreement between Ickes and Ronald J. Hollberg, president of Emery, was provided by Emery in response to appellant's protest. A fair reading of the agreement discloses that the interest of Ickes in offers filed by Hollberg derives from offers filed on behalf of the partnership. Thus, the issue of whether the partnership held an undisclosed interest in the protested lease offers is dispositive on the matter of undisclosed interests.

3. Whether the evidence establishes that Emery was in violation of the acreage limits at the time the protested lease offers were filed.

4. Whether Emery's leases may be immune from cancellation on the ground of assignment to a bona fide purchaser without notice.

5. Whether the partnership agreement created interests in the lease offers which Emery was obligated to disclose on the offer form.

The record discloses that certain lands included in lease I-16943 are within the Palisades Further Planning Area designated following completion of the Roadless Area Review and Evaluation II (RARE II). Pursuant to statute enacted October 2, 1982, the Secretary of the Interior is barred from issuing oil and gas leases on any lands "within any Forest Service RARE II areas recommended for wilderness designation or allocated to further planning in Executive Communication 1504 Ninety-sixth Congress (House Document numbered 96-119)." Continuing Appropriations, Fiscal Year 1983 (Joint Resolution), P.L. 97-276, § 126, 96 Stat. 1186, 1196 (1982). The Secretary has the authority to administratively cancel an oil and gas lease issued contrary to law through the inadvertence of his subordinates where the land has been excluded from leasing by statute. See D. M. Yates, 76 IBLA 208 (1983). Accordingly, the BLM decision to issue lease I-16943 for these lands is set aside and the case is remanded to permit cancellation of lease in relevant part. Counsel for BLM, citing BLM Instruction Memorandum No. 83-120, has noted that Departmental policy regarding lease offers for land precluded from leasing under this statute has been to suspend the offers. Thus, on remand the lease offer of Emery may be reinstated as to the lands precluded from leasing by P.L. 97-276 (subject to resolution of the sole party in interest issue discussed, infra).

Regarding the question of corporate qualifications, Emery tendered in response to the protest a copy of its qualifications statement filed for record with the Utah State Office, BLM. This statement contains a complete list of corporate officers. This statement was referenced on the Idaho BLM lease offers in accordance with the applicable regulation at the time, 43 CFR 3102.2-1 (1981). In response to appellant's protest, Emery tendered a copy of its annual corporate report filed with the Utah Secretary of State which reflects that as of February 14, 1980, the officers were those disclosed in Emery's qualifications statement with BLM. Appellant has not shown that the statement was not current.

The document naming Kent L. Jarrett, which BLM cited in its decision, was Emery's registration statement for issuance of securities, Form S-1 at page II-4. Jarrett signed the registration statement on December 22, 1980, as principal accounting officer of the corporation. This is essentially a position description as distinguished from a corporate title (e.g., president, vice president, secretary, etc.). The regulation at 43 CFR 3102.2-5 (1981) requiring disclosure of corporate officers is properly construed to mean corporate title holders and not the names of all employees holding a position within the firm such as chief accountant. Therefore, the protest of appellant that Emery had not established its corporate qualifications as required by the regulation was properly denied.

In response to the allegation in the protest that the acreage limitation was exceeded, BLM computed the acreage under lease or application by Emery and its affiliates during the time that the protested lease offers were pending. As a consequence of this detailed computation, BLM determined that the acreage limit was violated at the time that Emery lease offer I-17604 was filed and, accordingly, rejected that lease offer. Further, BLM found no violation of the acreage limit at the time the Emery lease offers under appeal were filed.

Trujillo contends on appeal that she raised sufficient evidence of undisclosed holdings by Emery in Idaho as of August 31, 1981, to require BLM to investigate the undisclosed acreage holdings of Emery as of October and November 1980 when the protested offers were filed. Appellant tendered as part of her protest a copy of Emery's corporate annual report showing net acreage in lease applications in the State of Idaho totaling 279,179 acres as of August 31, 1981. 3/ Trujillo's computation of net acreage in Emery's name as disclosed in BLM records as of August 31, 1981, totaled 210,945.98 acres. Appellant contends this leaves 68,224.02 acres in which Emery has an interest that is not reflected on the BLM records. Appellant contends that this discrepancy requires an investigation by BLM.

The relief requested by appellant is beyond the scope of this appeal. Appellant has not shown error in the computation of acreage prepared by BLM and relied upon in the decision below. Although there is a discrepancy between the acreage reported on Emery's annual report and that identified by appellant in the name of Emery on the BLM records, this does not establish an acreage violation as of October or November 1980. The acreage computation by BLM was apparently done with considerable care and attention to accuracy. No error having been shown in the BLM computation, appellant has established no ground for reversing BLM on this basis.

[1] Emery contends that leases I-16942 and I-16946 have been sold to Exxon who acquired them in good faith, for valuable consideration, and without knowledge of any defect. Thus, Exxon is alleged to be a bona fide purchaser in whose hands the leases are immune from cancellation. Emery alleges that it agreed to sell the leases on April 7, 1982, subject to specified consideration (including reservation of an overriding royalty interest to Emery) and that a downpayment of $17,340 was paid to Emery on May 11, 1982. The status of a bona fide purchaser and the protection afforded thereby requires purchase of a "lease" or interest therein as distinguished from a lease offer or application. 30 U.S.C. § 184(h)(2) (1976); Robert W. Myers, 63 IBLA 100 (1982). Prior to the date of lease issuance, a detailed protest of the subject lease offers was filed on behalf of Trujillo. The BLM decision of November 5, 1982, denying the protest as to these lease offers, a copy of which was placed in the lease file for each offer, expressly noted that it would become final 30 days after receipt "unless an appeal is filed." An appeal was timely filed November 29, 1982.

3/ As of this date the BLM computation, which includes acreage chargeable to Emery affiliates, is 403,654. The limit for acreage held in one state is 246,080 acres. 30 U.S.C. § 184(d) (Supp. V 1981); 43 CFR 3101.1-5.

This case is properly distinguished from Inexco Oil Co., 54 IBLA 260 (1981), cited by Emery. Although the assignment in Inexco was executed and consideration paid in advance of lease issuance, the protest was not filed until more than a year after lease issuance. Id. at 263. At the time of lease issuance in the leases at issue here the record included a detailed protest by a junior applicant and a decision denying that protest which expressly noted that it would be final only if no timely appeal was filed. Unlike Inexco, there was in this case a sufficient "climate of adversity" surrounding lease issuance to put a purchaser on notice. See Home Petroleum Corp., 54 IBLA 194, 207-08, 88 I.D. 479, 486 (1981), aff'd, Civ. No. C81-0208 (D. Wyo. Jan. 11), appeal filed on other grounds, Civ. No. 82-1335 (10th Cir. filed Mar. 1982). Assignees of Federal oil and gas leases who seek to qualify as a bona fide purchaser are deemed to have constructive notice of the records pertaining to the lease. Winkler v. Andrus, 614 F.2d 707 (10th Cir. 1980). Thus, Emery's assignee is not a bona fide purchaser without notice of defect in title.

The critical issue raised by this appeal is whether the limited partnership agreement between Emery, Tideway Western, Inc., and Robert Howard created an interest in the Emery lease offers which was required to be disclosed on the lease offer form. This issue has two elements: whether the terms of the partnership agreement create such an interest in the other partners and whether the agreement was terminated or rights thereunder waived prior to the time the protested offers were filed.

The partnership agreement was executed by Robert Howard as limited partner on October 12, 1979; by Tideway Western, Inc., as both general and limited partner, on October 30, 1979; and by Emery as general partner on November 23, 1979. The agreement was filed for record in the office of the clerk of court, Salt Lake County, Utah, on November 26, 1979. The business of the partnership is defined at Article 3:

> [E]ngaging in all aspects of the oil and gas business including * * * acquiring, purchasing, leasing, * * * selling, transferring, and otherwise utilizing land, minerals or water upon, beneath and above certain land located within the general vicinity of the Rocky Mountain States of these United States. Such lands contemplated herein shall include Federal Bureau of Land Management managed lands available for non-competitive oil and gas leasing.

Under Article 4, the term of the partnership commences on the date of filing and recording the partnership agreement and continues to December 31, 2003, "unless terminated earlier pursuant to this Agreement." The interest of the partners in the partnership assets is defined at Article 8: "All net revenues, minus expenses of the Partnership, including the proceeds of any sale or sublease of Partnership property shall be allocated 33 1/3% to Emery Energy, Inc., and 66 2/3% to the Limited Partners."

Article 27 of the partnership agreement sets forth the duty of Emery not to compete with the partnership in filing lease offers in the State of Idaho except under certain limited circumstances. The article provides, in pertinent part:

ARTICLE 27

NON-COMPETITION

Hereinafter, but during the period of this Agreement, the General Partners agree not to compete with each other within the states of Utah, Nevada, Idaho, Montana, Wyoming, Colorado, New Mexico, or Arizona for non-competitive oil and gas leases on state or federally owned or managed lands, except the General Partners may compete for drawings on simultaneous oil and gas leases, unless otherwise agreed to in writing by the parties. This provision shall apply to the General Partners, any business entity in which they, any officer, director, immediate family member of such or key employee, own or control a 10% or more interest, or any individual officer, director, key employee, any authorized agent, representative, or attorney-in-fact of any General Partner, and such other person or entity who in any direct way represents a General Partner hereto, unless otherwise agreed to in writing by the General Partners. This provision contemplates that Tideway Oil Company, [4/] its subsidiaries, Arjay Oil, Dave Gammill, Marvin Oxley, Benton Vernon, Ronald J. Hollberg, Jr. their wives, individual companies, and the like, shall in no way compete with this Limited Partnership unless agreed to in writing.

Notwithstanding the foregoing, any of the prohibited competition may be entered into provided that the entity used by either General Partner extends to the other General Partner the opportunity to participate on a fifty-fifty basis by putting up a percentage of the cost equal to its participatory interest at the time such amounts are due. For example, if Tideway Oil Company desired to lease public lands in New Mexico for oil and gas purposes, it would be required to offer Emery an opportunity to participate on a fifty-fifty basis.

* * * * * * *

Emery shall be permitted to file applications and otherwise compete in the oil and gas business with Tideway and the Partnership in the above states if Tideway declines to acquire an offered application/lease from the Limited Partners and/or refuses to submit monies as requested within the time stated in Article 6 and 29 or if the Limited Partners otherwise default as to any required act on their party [sic], or the Limited Partners have made the maximum contributions required of the Partnership Agreement.

4/ The record does not disclose the relationship of Tideway Oil Company to Tideway Western, Inc. It appears that they are regarded as a single entity by the terms of the partnership agreement. Whether Tideway Oil Company is the same entity as Tideway Western, Inc., or rather a third-party beneficiary of the partnership agreement, does not affect the answer to the question of whether it has an interest under the partnership agreement.

The terms of the partnership agreement, especially Article 27 thereof, leave little doubt that Emery, as managing general partner, was under an obligation not to compete with the partnership by filing for its own account noncompetitive over-the-counter Federal oil and gas lease offers in the State of Idaho. Exceptions were recognized only where the partners were offered the option to participate in the lease or where the partners decline to tender their capital contribution as required under the partnership agreement in order to participate. Emery itself acknowledged in a registration statement filed with the Securities and Exchange Commission on March 9, 1981, pursuant to the Securities Act of 1933 (Amendment No. 1 to Form S-1) at page 24: "The Partnership agreement contains restrictions on the Company's federal noncompetitive oil and gas lease application activity and, among other things, requires the Company to allow the Partnership to participate in such activity."

[2] This Board has previously held that where a partner in a firm engaged in the oil and gas business filed an oil and gas lease offer in his own name, the partnership is entitled to participate in the benefits accruing from any issued lease as a consequence of the partner's fiduciary duty to the firm. Johnnie B. Gryder, 38 IBLA 146, 149 (1978). Such a claim is an "interest" within the scope of the definition at 43 CFR 3100.0-5(b). Id. 5/ A fortiori, in a case such as the present where Emery is bound by an express covenant not to compete, the partnership agreement gives rise to an interest in the lease offers which must be disclosed on the lease offer form. The fact that the partners might elect not to participate is irrelevant. They had the option to participate which gave them an interest in the lease. Pursuant to the regulation in effect at the time the lease offers were filed, the offeror was required to disclose the names of other parties in interest on the lease offer and to provide a copy of the agreement between offeror and the other parties in interest within 15 days of filing the lease offer. 43 CFR 3102.2-7 (1981). 6/ Consequently, the Emery offers must be rejected for failure to comply with the regulations if the partnership is found to have been legally operative at the time the offers were filed.

5/ An "interest" is defined in the regulations as:

"An 'interest' in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options or any agreement covering such 'interests.' Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any aggrement [sic] or understanding existing at the time when the application or offer is filed, is deemed to constitute an 'interest' in such lease."

43 CFR 3100.0-5(b).

6/ This regulation was subsequently repealed effective Feb. 26, 1982. 47 FR 8544. The existence of conflicting noncompetitive lease offers filed while the former regulation was in effect, coupled with the obligation of the Secretary of the Interior under 30 U.S.C. § 226 (Supp. V 1981) to issue noncompetitive oil and gas leases only to the first-qualified applicant therefore, requires adjudication of these offers under the former regulation.

Counsel for Emery contends that the partnership was terminated on September 24, 1980 (prior to the filing of the protested offers), when the partners verbally agreed to cease the business of the partnership. Emery argues that since a partnership is a consensual relationship, dissolution may be evidenced by an agreement of the partners that the partnership shall cease. Counsel for appellant alleges that the letter of September 24, 1980, from Emery to Tideway Oil Company does not by its terms terminate the partnership. Further, there is no evidence of consent to the letter by Howard, one of the limited partners. Rather, appellant contends that the September 24, 1980, letter and subsequent correspondence merely reflect a process of negotiation with a view to ending the partnership and settling the parties rights under the partnership agreement. Appellant alleges the partnership agreement was not ultimately terminated before the agreement of December 17, 1980, was reached (after the protested lease offers at issue in this appeal were filed). Further, appellant argues that this agreement could not retroactively alter the legal obligation to disclose the interests of the partners at the time the offers were filed.

Regarding dissolution of the partnership, Article 15 of the partnership agreement provides that the partnership shall be dissolved upon 90 days written notice to the limited partners of the election by the general partners to dissolve and wind up the affairs of the partnership. Partners may agree on terms of partnership dissolution differing from those originally provided in the partnership articles. 60 Am. Jur. 2d Partnership § 176 (1972). Evidence in the record of the terms of the alleged verbal agreement of September 24, 1980, is inconclusive on the question of whether the partners' right of participation in lease offers was terminated. There is a copy of a letter of September 24, 1980, addressed to Dave Gammill, president of Tideway Oil Company, from R. J. Holberg, Jr., president, Emery Energy, Inc. The text of the letter reads as follows:

> Pursuant to our telephone conversation of this date, Emery Energy Inc. hereby agrees that if Tideway Oil Company will grant an extension of sixty to ninety days from this date to control and utilize the funds in our account and with the account with the Bureau of Land Management, Emery Energy Inc. agrees that at the end of this sixty-to-ninety day period, if Tideway Oil Co. so desires, to reimburse Tideway the net dollars it has coming under our agreement. Emery Energy also agrees to carry Tideway Oil Co. for a 1/8th interest on federal oil and gas applications filed by Emery Energy that are in number equal to the dollars that Tideway Oil Co. has invested in federal oil and gas applications at the date of this letter. This 1/8th interest is equal to 1/8th of the gross proceeds received by Emery Energy Inc. in the sale of any of these federal oil and gas lease applications. It is also agreed that Emery Energy will assign to the Tideway Oil Co. a two percent (2%) overriding royalty on any leases sold in the manner described above. Emery Energy Inc. agrees to carry Tideway Oil Co. for this 1/8th interest for a period of eighteen (18) months from the date of this letter.
>
> If this meets with your approval, please sign below where indicated and return a copy to my office.

The letter appears to describe the terms agreed to between the two general partners regarding the terms of termination of the limited partnership, but the date of termination appears to be 60 to 90 days hence subject to a "carried" one-eighth interest in applications sold in the ensuing 18 months. Although the letter was signed by the general partners, Emery and Tideway, it was not signed by the limited partner, Robert Howard.

The letter does provide for the use by Emery of partnership funds for a period from 60 to 90 days from the date of the letter with reimbursement of Tideway's net capital contribution and share of any proceeds at that time in accordance with the partnership agreement. Although the letter agreement gives Tideway the option to terminate the partnership at the end of the time period "if Tideway Oil Co. so desires" upon the terms specified, there is a serious question as to whether the letter agreement could effectively terminate the limited partnership agreement, let alone terminate it effective September 24, 1980. There is no indication from the letter that Howard was a party to the "termination" agreement of September 24, 1980, or even had notice of it. Article 15 of the partnership agreement provides for termination upon 90 days written notice to the limited partners of the election by the general partners to dissolve the partnership. The letter of September 24, 1980, provides for retention and control by Emery over the partnership assets for 60 to 90 days at which time Tideway could receive the funds to which it is entitled under the partnership agreement. The September 24, 1980, letter appears to be an agreement between the general partners about how the limited partnership assets were to be handled during the contractual notice period. This interpretation is reinforced by subsequent correspondence between the general partners.

The record also contains a copy of a letter of November 5, 1980, from Emery to Tideway which purports to "clarify" the September 24, 1980, agreement. In addition, there is a December 1, 1980, letter from Emery to Tideway enclosing a "proposed agreement to terminate the limited partnership." These shed no additional light on the issue. Finally, there appears a copy of a termination agreement executed by Emery on December 17, 1980, which purports to supersede and clarify the letters of September 24, 1980; November 5, 1980; and December 1, 1980. Paragraph 4 of this agreement provides:

> 4. The Limited Partners confirm that they previously agreed on September 24, 1980, to waive any interests in any federal non-competitive oil and gas lease applications filed by Emery on or after September 24, 1980, and prior to the date of the termination of the Partnership (as termination is determined under paragraph 2 above) and the right to participate in any leases granted pursuant to lease applications filed during that period; any such applications, including any refilings of any such applications, are referred to herein as the "Excluded Applications."

This was the provision upon which BLM based its decision dismissing the protest.

[3] It is clear from the documents in the record that the partnership itself was not terminated as of September 24, 1980. Rather, there was substantial discussion and negotiation after that time as to the terms of dissolution. The partners could have made a legally effective agreement prior to the filing of the protested lease offers to waive their interests in the offers under the partnership agreement. However, the letter of September 24, 1980, does not manifest such an agreement. If such an agreement were reached after the protested lease offers were filed, it could not retroactively validate the offers which failed to disclose interested parties.

An evidentiary hearing is properly ordered where the case record presents an unresolved issue of material fact. Accordingly, pursuant to 43 CFR 4.415, the decision denying appellant's protest of the lease offers is set aside and the case is referred to the Hearings Division, Office of Hearings and Appeals, for assignment of an Administrative Law Judge to conduct a hearing on the question whether the parties to the partnership agreement had waived their right to participate in Emery's lease offers prior to the date those offers were filed. The decision of the Administrative Law Judge shall be final for the Department in the absence of a timely appeal therefrom to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from denying the protest is reversed and remanded in part, as to those lands within I-16943 for which the lease must be canceled and the offer may be reinstated, and set aside in part and referred to the Hearings Division for the conduct of an evidentiary hearing.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

R. W. Mullen
Administrative Judge